

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LEE WIDEMAN,

Defendant-Appellant.

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UNPUBLISHED  
February 23, 2006

No. 257143  
Wayne Circuit Court  
LC No. 04-004108

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant Charles Wideman appeals as of right his jury trial convictions for armed robbery,<sup>1</sup> assault with intent to do great bodily harm less than murder,<sup>2</sup> felon in possession of a firearm,<sup>3</sup> and possession of a firearm during the commission of a felony.<sup>4</sup> The trial court sentenced Wideman as a fourth habitual offender<sup>5</sup> to 50 to 100 years in prison for the armed robbery conviction, life in prison for the assault conviction, 40 months to five years in prison for the felon in possession of a firearm conviction, and five years in prison for the felony-firearm conviction. We affirm Wideman's convictions, but remand for resentencing with respect to the armed robbery and assault with intent to do great bodily harm less than murder convictions.

I. Basic Facts And Procedural History

On February 27, 2004, James Wallace drove to a restaurant in Detroit. Beth Brantley accompanied Wallace. Wallace parked his vehicle in front of the restaurant. On her way into the restaurant, Brantley noticed Wideman standing near the corner of the building, talking on a telephone. Wideman asked her the time. Brantley told Wideman that it was 7:05 p.m., and continued to enter the restaurant. As Wallace exited his vehicle, Wideman approached him,

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 750.84.

<sup>3</sup> MCL 750.224f.

<sup>4</sup> MCL 750.227b.

<sup>5</sup> MCL 769.12.

grabbed his arm, and placed a gun in his stomach. Wideman demanded that Wallace give him money and told Wallace that, “[he knew] what this [was] about.” Wideman pinned Wallace down and began to pat him down. Wallace was able to retrieve a change purse from his right pocket and told Wideman to “take it.” Wallace’s change purse contained approximately \$12. Wideman took the money, told Wallace, “I ought to kill you,” and fired the gun at Wallace, shooting him in the right leg. Wideman then turned and ran away.

Detroit Police Officer Jason McDonald received Wideman’s description and later found him a block away from the crime scene. Officer McDonald stopped Wideman, but he did not believe he had enough information to make an arrest at that time.

Officer McDonald brought Wallace into the police precinct after he was discharged from the hospital the following morning. Officer McDonald showed Wallace a group of photographs to determine whether Wallace could select the person who shot him. Wideman’s photograph was included in the photo lineup. Wallace selected Wideman’s photograph from the group of photographs. Brantley likewise identified Wideman’s photograph as the man who shot Wallace. Based on this information, Officer McDonald secured a warrant for Wideman’s arrest.

## II. Motion For Mistrial; Unresponsive Testimony

### A. Standard Of Review

Wideman argues that the trial court abused its discretion when it denied his motion for a mistrial, which Wideman based on Officer McDonald’s alleged unresponsive testimony at trial. “The grant or denial of a motion for mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted.”<sup>6</sup> Prejudice is shown when the trial court’s ruling is so grossly in error that it deprives the defendant of a fair trial or amounts to a miscarriage of justice.<sup>7</sup> In general, an unresponsive, volunteered answer that injects improper evidence into a trial is not a basis for granting a mistrial, unless the prosecutor knows in advance that the witness will give the testimony.<sup>8</sup> However, police officers have a special duty to refrain from making prejudicial and irrelevant remarks during their testimony.<sup>9</sup> Such testimony, even if it is nonresponsive, may require reversal,<sup>10</sup> unless the other evidence clearly establishes the defendant’s guilt.<sup>11</sup>

### B. Officer McDonald’s Testimony

During Officer McDonald’s testimony, the prosecution asked him about the number of photographs contained in the lineup that he showed Wallace. McDonald responded as follows:

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<sup>6</sup> *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999).

<sup>9</sup> *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

<sup>10</sup> *People v O’Brien*, 113 Mich App 183, 209; 317 NW2d 570 (1982).

<sup>11</sup> *People v Snider*, 239 Mich App 393, 419-420; 608 NW2d 502 (2000).

I started showing him all our armed robbery people in the 4<sup>th</sup> precinct, or people we've come in contact with. I think we got to the – there's six per page, I think we got to the third page; so approximately 18 photos.

We conclude that the trial court did not abuse its discretion in denying Wideman's motion for a mistrial. It is clear that the statement, taken in context, was not prejudicial. Officer McDonald stated that he showed Wallace pictures of "all our armed robbery people in the 4<sup>th</sup> precinct," but clarified the statement in saying, "or people we've come in contact with." According to Officer McDonald's other testimony, he found Wideman a block away from the scene and took his information because he fit the description of an armed robber. Therefore, it makes sense that the police would include his photograph in a lineup of contacts related to armed robberies. Because Officer McDonald's unresponsive testimony did not have any substantial likelihood of appreciably prejudicing Wideman, the trial court did not abuse its discretion when it denied Wideman's motion for a new trial.

### III. Ineffective Assistance Of Counsel

#### A. Standard Of Review

Wideman argues that defense counsel was ineffective in failing to call an alibi witness. "Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact."<sup>12</sup> "A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."<sup>13</sup> To establish ineffective assistance of counsel, a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness, (2) that defendant was so prejudiced thereby that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable.<sup>14</sup> "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."<sup>15</sup> When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without the benefit of hindsight.<sup>16</sup> Moreover, a defendant must overcome the presumption that the challenged action was sound trial strategy.<sup>17</sup>

#### B. Alibi Witnesses

We conclude that the failure of Wideman's counsel to call an alibi witness who refused to attend the trial did not constitute ineffective assistance of counsel. A defense attorney's failure

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<sup>12</sup> *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

<sup>13</sup> *Id.*

<sup>14</sup> *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

<sup>15</sup> *Id.*; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>16</sup> *Rockey*, *supra* at 76-77.

<sup>17</sup> *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

to call witnesses is presumed to be trial strategy rather than ineffective assistance.<sup>18</sup> A defense attorney's failure to call a witness is only considered ineffective assistance if it deprived the defendant of a substantial defense.<sup>19</sup> A substantial defense is one that may have changed the outcome of the trial.<sup>20</sup>

Here, Wideman's alibi witness appeared on the first day of trial. She contacted defense counsel early on the second day of trial but failed to appear at the time slated for her testimony. Contrary to defense counsel's urgings, Wideman chose to stand mute. Under the circumstances, Wideman failed to substantiate his alibi and merely claims error for his counsel's failure to issue a subpoena forcing the witness' appearance. Therefore, we conclude that Wideman has failed to demonstrate ineffective assistance rather than trial strategy in counsel's handling of the alibi witness.<sup>21</sup>

#### IV. Jury Instructions

##### A. Standard Of Review

Wideman argues that the trial court erroneously instructed the jury that he possessed a handgun, a question that Wideman argues should have been left to the finder of fact. And Wideman argues that defense counsel was ineffective for not objecting to the instruction. Errors in jury instructions are questions of law that we review de novo.<sup>22</sup> We review jury instructions in their entirety to determine if error requiring reversal occurred.<sup>23</sup> There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights.<sup>24</sup>

##### B. The Trial Court's Instructions

The trial court gave the jury the following instructions with respect to the felon in possession of a firearm charge:

The Statute requires in that case that there be—that the person having previously been convicted of a felony. And it was stipulated by the attorneys that the defendant had previously been convicted of a felony, and that he was in possession of a firearm. Those are the elements. A person having been previously convicted of a felony, and being in possession of a firearm, before his rights to possess a firearm were restored. And there's no evidence to suggest that.

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<sup>18</sup> *Rockey, supra* at 76-77.

<sup>19</sup> *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

<sup>20</sup> *Id.*

<sup>21</sup> *Rockey, supra* at 76-77.

<sup>22</sup> *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

<sup>23</sup> *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

<sup>24</sup> *Id.*

So, if you find that this gentleman had previously been convicted of a felony, and he was in possession of a firearm, those are the elements.

Reading the jury instructions in their entirety, we conclude that the trial court did not commit error requiring reversal. The trial court merely delineated the elements of felony firearm. The trial court explained that Wideman stipulated to the first element and that he did not present any evidence on the last element. The trial court ended its instructions by stating that the elements of the crime were that Wideman was previously convicted of a felony and that he was in possession of a firearm. Although the instructions were confusing, the trial court left the factual question of Wideman's possession of a firearm to the jury. Moreover, the jury's guilty verdict on all counts indicates that it found that Wideman shot Wallace through the leg. It stands to reason that the jury was persuaded that Wideman had a firearm, and any confusion stemming from the felony-firearm instruction was harmless. Therefore, we conclude that the trial court's instructions fairly presented the issues to be tried and sufficiently protected Wideman's rights.<sup>25</sup>

### C. Defense Counsel's Failure To Object

Wideman also contends that defense counsel was ineffective for failing to object to the trial court's instructions. Because Wideman has not shown error, he has also failed to demonstrate ineffective assistance for his counsel's failure to object.<sup>26</sup>

## V. Sentencing

### A. Standard of Review

Wideman argues that he is entitled to resentencing for his assault with intent to do great bodily harm less than murder conviction. He argues that the trial court abused its discretion in sentencing him to life imprisonment, which is a departure from the sentencing guideline requirements. Wideman contends that this matter should, therefore, be remanded for the trial court to articulate on the record its substantial and compelling reasons for the departure.

We review for an abuse of discretion a trial court's imposition of a sentence.<sup>27</sup> We also review for an abuse of discretion a trial court's decision to impose an increased sentence pursuant to the habitual offender act.<sup>28</sup> However, we review de novo the proper construction or application of statutory sentencing guidelines.<sup>29</sup>

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<sup>25</sup> *Heikkinien*, *supra* at 327.

<sup>26</sup> *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

<sup>27</sup> *People v Hendrix*, 263 Mich App 18, 20; 688 NW2d 838 (2004).

<sup>28</sup> *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

<sup>29</sup> *Id.*

## B. The Trial Court's Sentence

Armed robbery is a Class A offense.<sup>30</sup> Without objection, and in accordance with the probation department's presentence investigation report (PSIR) recommendation, the trial court calculated Wideman's Prior Record Variable (PRV) for the armed robbery conviction at 77 points. This placed him in Level F. The trial court calculated his total Offense Variable (OV) at 90 points. This placed him in Level V.<sup>31</sup> The corresponding recommended minimum sentence guidelines range for Wideman's armed robbery conviction is 225 to 375 months, or life.<sup>32</sup> Increasing the upper limit of the range by 100 percent in accordance with the habitual offender statute<sup>33</sup> results in a recommended minimum sentence range of 225 to 750 months, or life. The trial court sentenced Wideman to 50 to 100 years (600 to 1200 months) for the armed robbery conviction, a term within the recommended minimum sentence range as augmented by the habitual offender statute.

Assault with intent to do great bodily harm less than murder is a Class D offense.<sup>34</sup> The trial court did not calculate the guidelines for the assault conviction, but the same PRV and OV calculations result in a sentencing guideline range of 43 to 76 months.<sup>35</sup> The habitual offender guidelines augment his minimum sentence guideline range to 43 to 152 months.<sup>36</sup> But the trial court sentenced Wideman to life for the assault conviction, a term outside the recommended minimum sentence range,<sup>37</sup> even as augmented by the habitual offender statute.<sup>38, 39</sup>

## C. Sentencing Departure

Under Michigan's legislative sentencing guidelines, a trial court may only depart from those guidelines if it has substantial and compelling reasons to do so, and it states those reasons

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<sup>30</sup> MCL 777.16y.

<sup>31</sup> MCL 777.62.

<sup>32</sup> *Id.*

<sup>33</sup> MCL 777.21(3).

<sup>34</sup> MCL 777.16d.

<sup>35</sup> MCL 777.65.

<sup>36</sup> MCL 769.12; MCL 777.21(3).

<sup>37</sup> MCL 777.16d.

<sup>38</sup> MCL 769.12; MCL 777.21(3).

<sup>39</sup> Under *People v Houston*, 261 Mich App 463, 475; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005), "whether a life sentence is within the guidelines is . . . a function of the upper limit of the recommended minimum sentence range for an indeterminate sentence." And where the upper range is 300 months or more, "a life sentence is an appropriate alternative sentence within the guidelines recommendation." *Id.* But *Houston* does not apply in this case because, even after augmenting the assault sentence under the habitual offender statute, the upper range is only 152 months. Moreover, that portion of the *Houston* decision has been renounced by our Michigan Supreme Court. 473 Mich 410 n 22.

on the record.<sup>40</sup> The trial court's reasons for departing from those guidelines must be objective and verifiable.<sup>41</sup> A trial court may not base a departure on an offense or offender characteristic that was already taken into account in determining the appropriate sentence range, unless the trial court "finds from the facts in the record that the characteristic has been given inadequate or disproportionate weight."<sup>42</sup> "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed."<sup>43</sup>

Assault with intent to commit great bodily harm less than murder is punishable "by imprisonment in the state prison not more than 10 years."<sup>44</sup> However, "[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life[,]," MCL 769.12(1)(a) allows the court to sentence a fourth-offense habitual offender "to imprisonment for life or for a lesser term." The trial court acknowledged that the assault with intent to do great bodily harm conviction is "an offense that carries more than five years" and then concluded that "[a]s an habitual, he's subject to a life sentence."

In *People v Johnigan*, the defendant was facing sentencing on a single conviction. However, this was his fourth felony conviction, thereby activating the habitual offender statute.<sup>45</sup> The majority held that, despite the fact that the habitual offender statute provides for a term of life, if the fourth felony conviction is punishable on a first conviction for a maximum term of five years or more, the trial court must nevertheless calculate the guidelines range for the conviction and put substantial and compelling reasons on the record if it departs from those guidelines.<sup>46</sup>

*Johnigan*, therefore, indicates that the trial court's decision to sentence Wideman to life for the assault conviction is not supported by the habitual offender statute.<sup>47</sup> Despite the fact that the habitual offender statute provides for a term of life if the fourth felony conviction is punishable on a first conviction for a maximum term of five years or more, the trial court must still calculate the guidelines range for the conviction and put substantial and compelling reasons on the record if it departs from those guidelines.<sup>48</sup> The express reference by the Legislature to the habitual offender statute in the instructions for the sentencing guidelines indicates that the

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<sup>40</sup> MCL 769.34(2), (3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

<sup>41</sup> *Abramski*, *supra* at 74.

<sup>42</sup> MCL 769.34(3)(b); *Abramski*, *supra* at 74.

<sup>43</sup> *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003).

<sup>44</sup> MCL 750.84.

<sup>45</sup> *People v Johnigan*, 265 Mich App 463, 265; 696 NW2d 724 (2005).

<sup>46</sup> *Id.* at 473-475 (Sawyer, J.), 478-479 (Schuette, J., concurring).

<sup>47</sup> MCL 769.12.

<sup>48</sup> *Johnigan*, *supra* at 473-474, 478-479.

Legislature contemplated a situation that implicated *both* statutes. Where the language of a statute is unambiguous, we presume that the Legislature intended the meaning clearly expressed and we may not engage in further construction of the statute.<sup>49</sup>

Wideman's habitual offender status was taken into account in augmenting his minimum sentence guideline range from 43 to 76 months to 43 to 152 months.<sup>50</sup> And a panel of this Court has recently affirmed that "[a] sentence of life in prison is a departure from the guidelines if it is not recommended by the guidelines as scored for the appropriate habitual offender level."<sup>51</sup> Although MCL 769.12(1)(a) authorizes a life sentence for any fourth-offense habitual offender when the underlying offense is a five-year felony or greater, it "says nothing about whether imposing a life sentence in a particular case represents a departure from the sentencing guidelines and, therefore, the trial court is subject to the requirements and limitations imposed by statute regarding such departures."<sup>52</sup> We therefore conclude that because a life sentence is above the guidelines range for any Class D offense, the trial court was required (1) to articulate substantial and compelling reasons for its departure or (2) to explain why the habitual offender characteristic had been given inadequate or disproportionate weight in order to justify sentencing Wideman to life for the assault with intent to commit great bodily harm less than murder conviction.<sup>53</sup>

#### D. *Mack*

We note, however, that in the absence of substantial or compelling reasons to depart from the guidelines for Wideman's assault conviction,<sup>54</sup> the trial court could instead choose, in its discretion and in keeping with the plain language<sup>55</sup> of MCL 771.14 as interpreted by *People v Mack*, to resentence Wideman to life for the armed robbery conviction without having to put substantial or compelling reasons on the record.

In *Mack*, the defendant was convicted of third-degree criminal sexual conduct (CSC III), a Class B felony carrying a statutory maximum penalty of 15 years in prison, and assault with intent to commit criminal sexual conduct involving sexual penetration (AWICSC), a Class D felony carrying a statutory maximum penalty of ten years in prison.<sup>56</sup> The PSIR recommended a calculation for the CSC III conviction, but the trial court did not separately score the AWICSC

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<sup>49</sup> *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

<sup>50</sup> MCL 777.21(3).

<sup>51</sup> *People v Keys*, unpublished opinion of the Court of Appeals, issued December 6, 2005 (Docket No. 254642), slip op p 2, citing MCL 777.21(3); MCL 777.66; *Johnigan*, *supra*; *Houston*, *supra*.

<sup>52</sup> *Johnigan*, *supra* at 473.

<sup>53</sup> MCL 769.34; *Abramski*, *supra* at 74; see *Johnigan*, *supra* at 473-474.

<sup>54</sup> See discussion, part II.C., *infra*.

<sup>55</sup> *Mack*, *supra* at 126.

<sup>56</sup> *Mack*, *supra* at 127; see MCL 777.16y.



conviction.<sup>57</sup> The defendant argued that he was entitled to resentencing because the trial court erred by not separately calculating the guidelines for his AWICSC conviction and because his AWICSC conviction was a departure from the sentencing guidelines.<sup>58</sup> The *Mack* Court disagreed. According to *Mack*, when calculating concurrent sentences, a trial court may sentence a defendant based only on the highest class crime conviction. The *Mack* Court noted that MCL 771.14(2)(e)(ii) and (iii), state that “for sentencing on multiple concurrent convictions, a PSIR would only be prepared for the highest crime class felony conviction and would no longer be prepared for each of the defendant’s multiple convictions.”<sup>59</sup> Thus, *Mack* held that concurrent sentences of 15 to 30 years’ imprisonment for both the CSC III and AWICSC convictions was appropriate even though the AWICSC conviction only carried a maximum ten-year sentence.<sup>60</sup>

Here, using the PRV and OV variables calculated without objection at trial, the minimum sentencing guidelines provide for a range of 225 to 375 months, or life, for Wideman’s armed robbery conviction.<sup>61</sup> Similarly, armed robbery is “punishable by imprisonment for life or for any term of years.”<sup>62</sup> A life sentence for the armed robbery conviction is, thus, squarely within the statutory guidelines. Thus, the sentencing guidelines empower the trial court to sentence Wideman to life for the armed robbery charge. And if the trial court did resentence Wideman to life for the armed robbery conviction, under the *Mack* holding, it could then also properly sentence Wideman to life for the assault conviction.

We acknowledge that the *Mack* Court declined to decide “whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines pursuant to MCL 771.14(2)(e)(ii) and (iii) could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional.”<sup>63</sup> But allowing the lesser class felony sentence to exceed the sentence imposed on the highest crime class felony would be decisively and directly contrary to the principle of proportionality.<sup>64</sup>

We also acknowledge that in *Johnigan*,<sup>65</sup> Judge Sawyer disagreed with *Mack* that only the highest class crime must be scored because the express language of MCL 777.21(2) states that “[i]f the defendant was convicted of multiple offenses, subject to § 14 of chapter IX,<sup>[66]</sup> score

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<sup>57</sup> *Id.* at 124-125.

<sup>58</sup> *Id.* at 125-126.

<sup>59</sup> *Id.* at 128.

<sup>60</sup> *Id.* at 127.

<sup>61</sup> MCL 777.62.

<sup>62</sup> MCL 750.529.

<sup>63</sup> *Mack*, *supra* at 129.

<sup>64</sup> See *People v Jones*, unpublished opinion of the Court of Appeals, issued October 25, 2005 (Docket No. 256613), slip op pp 2-3, citing *Mack*, *supra*.

<sup>65</sup> *Johnigan*, *supra* at 470.

<sup>66</sup> Section 14 of chapter IX is MCL 769.14, which empowers the sentencing judge to review a prisoner’s previously imposed sentence under subsequent felony and habitual offender statutes.

each offense as provided in this part.” Judge Sawyer thus believed that each crime must be scored. But despite Judge Sawyer’s disagreement with *Mack*, he concluded that *Mack* was not dispositive to the resolution of *Johnigan* and that no conflict was created with the *Mack* decision.<sup>67</sup>

We therefore conclude that the trial court abused its discretion in sentencing Wideman to life for his assault with intent to do great bodily harm less than murder conviction. Even though Wideman is a fourth habitual offender, the trial court may not sentence Wideman to life for the assault conviction *alone*, unless the trial court puts on the record substantial and compelling reasons for a departure from the sentencing guidelines. But, because the guidelines permit a life sentence for Wideman’s armed robbery conviction, under *Mack*, the trial court could, in its discretion, elect instead to resentence Wideman to concurrent sentences of life for both the armed robbery and the assault convictions, without having to articulate substantial or compelling reasons and without any reference to MCL 769.12.

## VI. Conclusion

We affirm Wideman’s convictions but remand to the trial court for resentencing with respect to the armed robbery and assault with intent to do great bodily harm less than murder convictions. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Henry William Saad

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<sup>67</sup> *Johnigan*, *supra* at 478.